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In the
Supreme Court of the United States

OCTOBER TERM 1977

THE AUSTIN NATIONAL BANK, INDIVIDUALLY,
AND AS GUARDIAN OF THE ESTATE OF ROBERT
O. WALTERS, III, AN INCOMPETENT,

PETITIONER,

v.

JOHN E. NORTON, ET AL.,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

10-147
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PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE FIFTH CIRCUIT

The Austin National Bank, Individually, and as Guardian of the Estate of Robert O. Walters, III, an Incompetent (Petitioner), petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on October 15, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals (Appendix A) is not yet reported. The order of the Court of Appeals denying Petitioner's petition for rehearing (Appendix B) is not yet reported. The judgment of the Court of Appeals issued as a mandate (Appendix C) is not yet reported. The judgment of the United States District Court for the Western District of Texas, San Antonio Division (Appendix D) is not reported.

JURISDICTION

The opinion of the Court of Appeals was rendered on August 15, 1977. Petitioner timely filed its petition for rehearing which was denied on September 14, 1977 (Appendix B), and this petition is filed within ninety (90) days of that date. Petitioner filed its motion to stay the issuance of the mandate and this motion was granted on September 30, 1977 (Appendix E). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Petitioner, as guardian of the estate of an incompetent, may lawfully pay a fifty percent (50%) contingent attorneys' fee in light of the prohibition in the Texas Probate Code against contingent fees exceeding one-third of the amount recovered on behalf of the ward.

STATUTES INVOLVED

The Texas Probate Code, §§ 233 and 242 are involved and are reproduced in Appendix F.

STATEMENT

Respondents invoked the jurisdiction of the district court below because of diversity of citizenship between Petitioner, a national bank with its principal place of business in Austin, Texas, and Respondent, an attorney residing in the State of Illinois. Respondent represented the ward in a personal injury action. Petitioner was duly appointed as guardian of the estate of that ward.

Respondent obtained a judgment exceeding \$1,000,000.00 on behalf of the ward. After that judgment was taken and an appeal initiated, that lawsuit was settled for the sum of \$647,500.00. Respondent then made claim upon Petitioner as guardian for the payment of attorneys' fees equal to fifty percent (50%) of the amount recovered on behalf of the ward. Petitioner paid attorneys' fees equal to one-third of the amount recovered and refused to pay the difference between the fifty percent (50%) fee claimed and the thirty-three and one-third percent (33-1/3%) fee, because Petitioner believes the Texas Probate Code to prohibit such a payment. Respondent then initiated the instant case in the District Court below to collect his claim. The District Court below granted summary judgment for Petitioner. Respondent appealed and the Court of Appeals below reversed the judgment that had been entered.

REASON FOR GRANTING THE WRIT

There is a compelling reason why this Court should grant a writ of certiorari herein. The judgment and opinion of the United States Court of Appeals for the Fifth Circuit conflicts with decisions of the highest State court (the Texas Supreme Court) construing the Texas Probate Code, in *Glasgow v. McKinnon*, 14 S.W. 1050 (Tex. Sup. 1890); *In Re Guardianship of Estate of Neal*, 407 S.W. 2d 770 (Tex. Sup. 1966). Even if the instant case were properly characterized as a "collateral attack", which it is not, an illegal contract is subject to such an attack.

Purely state law questions were presented to the District Court below (diversity of citizenship was the sole basis of jurisdiction). Texas law is clear that the general provision for approval of "reasonable" attorneys' fees under § 242 of the Probate Code (Appendix F) is controlled by the specific prohibition in § 233 of the Texas Probate Code against contingent attorneys' fees in excess of one-third of the amount recovered. Literally tens of thousands of estates and millions of dollars are administered in Texas under these provisions. The opinion of the Court of Appeals below in a diversity case,

casts doubt upon what has been the clear rule of statutory construction in Texas. If permitted to stand, guardians, in order to obtain legal services for a ward, may be forced to accept contingent fee contracts that have been made illegal and against public policy by the Legislature.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

GRAVES, DOUGHERTY, HEARON,
MOODY & GARWOOD
2300 Austin National Bank Tower
Austin, Texas 78701

By Wm. Terry Bray
WM. TERRY BRAY

COUNSEL FOR PETITIONER
OCTOBER 1977

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari have been served upon Respondents by mailing same on October 28, 1977, to their attorneys of record as provided by Rule 33(1) and (2a), Supreme Court Rules at the following addresses:

Robert B. Summers, Esq.
Clark, Thornton & Summers
1910 Tower Life Bldg.
San Antonio, Texas 78205

Edward J. Kionka, Esq.
211 West Main Street
Belleville, Illinois 62220

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APPENDIX A

NORTON v. AUSTIN NAT. BANK OF AUSTIN, TEX.

John E. NORTON et al.,
Plaintiffs-Appellants,

v.

The AUSTIN NATIONAL BANK OF
AUSTIN, TEXAS, Individually and as
guardian of the Estate of Robert O.
Walters, III, Defendant-Appellee.

No. 75-3356.

United States Court of Appeals,
Fifth Circuit.

Aug. 15, 1977.

Action was brought to recover attorney fees pursuant to retainer contract by attorneys who represented guardian of estate of mentally incompetent in a personal injury case. The United States District Court for the Western District of Texas, at San Antonio, Manuel L. Real, J., sitting by designation, granted motion of guardian for summary judgment and the attorneys appealed. The Court of Appeals, Simpson, Circuit Judge, held that after more than two years since date of entry of judgment of Texas probate court approving contingent fee contract, which was allegedly in violation of Texas statute, such judgment was safe from collateral attack.

Reversed.

Judgment \approx 475

Where retainer agreement, signed by Texas guardian of Texas mentally incompetent and providing for contingency fee of up to 50% with respect to personal injury claim on behalf of incompetent, was approved by Texas probate court and judgment was in effect for more than two years, judgment, which was entered by a court of competent jurisdiction

was safe from collateral attack upon ground that contingency fee contract contravened Texas statute. V.A.T.S. Probate Code, §§ 31, 233, 242.

Appeal from the United States District Court for the Western District of Texas.

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge:

This is an action for attorneys' fees brought by the attorneys who represented the guardian of the estate of Robert O. Walters, III, an incompetent, in a personal injury case. The district court granted the motion of defendant guardian for summary judgment, and this appeal followed. We reverse.

FACTS

In 1966, Robert O. Walters, III, was employed by an engineering firm to work as a surveyor on a gas transmission pipeline being constructed by Trunkline Gas Company in Tennessee, Kentucky and Illinois. On August 23, 1966, Walters was apparently walking or running across railroad tracks which bisected the construction site when he was struck in the head by a passing train. Walters as a result was so seriously injured that he was rendered a mental incompetent, with no prospect of recovery. On July 3, 1967, the County Court of Bexar County, Texas, sitting as a probate court, declared Walters mentally incompetent and appointed his father, Robert O. Walters, Jr., as Guardian of the person and of the estate of his son.

On March 10, 1970, Walters, Jr., entered into a contract with appellant attorneys Norton and Waite to represent his son in a tort action against Trunkline

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Gas Company, O. R. Burden Construction Company, the Louisville & Nashville Railroad Co., and certain individuals. The retainer agreement that Walters, Jr., signed in procuring the services of these attorneys read as follows:

"I hereby retain and employ Kirk Waite and J. E. Norton as my attorney to prosecute or settle all claims for damage against L & N R R or others who shall be liable on account of injuries of ward—Robert O. Walters, III on or about the 23 day of Aug. A.D. 1966. In consideration for services rendered and to be rendered I agree to pay my attorney a sum equal to 33% of whatever may be recovered from said claim either by suit, settlement or in any other manner; provided further that I agree to pay my attorney 50% of whatever may be recovered if a second trial or an appeal to the Appellate [sic] of [sic] Supreme Court becomes necessary.

"It is further agreed that in addition to the above attorney fees, all court costs, subpoenae costs, photos, depositions and court reporter costs, reports, witness statements, and expenses directly incurred in investigating or litigating this claim shall be paid by the undersigned client.

ROBERT O. WALTERS, JR.
Guardian for Robert O. Walters,
III.

"I hereby agree to the above and further agree to make no charge for services unless recovery is had in above claim and to make no settlement without consent of claimant.

KIRK C. WAITE J. E. NORTON
Attorney

Copy given to client."

The 33% contingent fee for trial work was handwritten into the contract, while

the 50% contingent fee was in the pre-printed portion of the contract.

On March 25, 1970, Walters, Jr., as guardian of his son's estate, petitioned the Bexar County Court for approval of the contract. The court entered an order authorizing the contract.

On March 23, 1971, upon the resignation of Walters, Jr., the Austin National Bank of Austin, Texas, (Bank) was appointed and qualified as guardian of the estate of the incompetent.

Suit was brought in the Circuit Court of St. Clair County, Illinois, on July 3, 1968. Before going to trial, appellants Norton and Waite retained the services of appellant Kionka, a specialist in civil appeals, who was to act as a consultant at the trial level and have full responsibility for the appeal. Kionka was to be paid out of the additional 16% stated in the contract for any appellate work.

L. & N. Railroad and O. R. Burden Construction Co. settled before trial for \$180,000. Trunkline, however, refused to settle, and the case went to trial in December 1971. On December 21, 1971, the jury returned a verdict in favor of plaintiff in the amount of \$575,000 compensatory damages and \$750,000 punitive damages, totaling \$1,325,000. This was reduced by the amount of the prior settlement of \$180,000, resulting in a net judgment of \$1,145,000.

On December 7, 1973, Michael Casey, an attorney for the guardian Bank, wrote to Norton and informed him that there was a statute, Tex.Prob. Code Ann., Section 233 (Vernon), which might be construed as limiting plaintiffs attorneys' fees to one-third of the amount recovered. On the basis of this statute, the Bank, as guardian, refused to pay attorneys' fees in excess of one-third of the amount of the settlement. An order was entered authorizing payment to ap-

NORTON v. AUSTIN NAT. BANK OF AUSTIN, TEX.

pellants Norton and Waite of \$215,833, one-third of the \$647,500 settlement. The balance, \$107,917, was placed in escrow by Bank pending the outcome of the fee dispute.

After formal demand for the balance by appellants, and refusal by appellee, suit was filed on June 21, 1974, against Bank, as guardian. Jurisdiction was asserted on grounds of diversity of citizenship and requisite amount in controversy. On February 25, 1975, Bank filed a motion for summary judgment which the district court granted on May 19, 1975, on the grounds that (1) the contract was unenforceable under Texas law, (2) it was an adhesion contract, and (3) whether or not the Probate Court of Bexar County ever "approved" the contingent contract did not control enforcement of the contract, since the Probate Court retained jurisdiction of the estate of the ward, and that court withdrew or attempted to withdraw the earlier order "approving" the contract and that the Probate Court refused to approve payment of more than one-third contingent fees to plaintiffs. Appellants' motion for rehearing, and to alter or amend the judgment was denied. This appeal followed.

Appellants urge several issues as possible grounds for reversal, each possibly

I. V.A.T.S. Probate Code, § 233, which provides:

§ 233. Collection of Claims and Recovery of Property

Every personal representative of an estate shall use ordinary diligence to collect all claims and debts due the estate and to recover possession of all property of the estate to which its owners have claim or title, provided there is a reasonable prospect of collecting such claims or of recovering such property. If he wilfully neglects to use such diligence, he and the sureties on his bond shall be liable, at the suit of any person interested in the estate, for the use of the estate, for the amount of such claims or the

sufficient standing alone to justify reversal. The issues presented are that the retainer contract which provided for a contingent fee of 50% of the amount recovered was valid and binding on a Texas guardian, where that contract was valid in Illinois where it was entered into and performed; that the guardian was estopped from attacking the contract's validity since it accepted the benefits of the contract; that irrespective of the validity of the contract, the order of the probate court approving it was res judicata and thus not subject to collateral attack.

While the reversal which we enter could perhaps be grounded on the conflicts of law point, or the estoppel point, we do not pass on those questions. We rest our decision on the last issue raised.

When the judgment of the Bexar County Court was entered on March 25, 1970, that court, acting as a probate court, had jurisdiction over the estate of Robert O. Walters, III. For that judgment to be questioned, it should have been attacked by a bill of review within two years of the date it was entered. Tex.Prob. Code Ann., Section 31 (Vernon). Appellee Bank argues that the contract involved here is in contravention of Texas¹ law and is thus void and

value of such property as has been lost by such neglect. Such representatives may enter into contract to convey, or may convey, a contingent interest in any property sought to be recovered, not exceeding one-third thereof, for services of attorneys and incidental expenses, subject only to approval of the court in which the estate is being administered. Acts 1955, 54th Leg., p. 88, ch. 55.

The argument goes that the judgment sought was "property sought to be recovered" inasmuch as it was a chose in action.

Appellants counter that V.A.T.S. Probate Code, § 242 controls. That section provides:

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unenforceable. However, on facts quite similar to those involved here, the Texas Court of Civil Appeals rejected such an argument:

"[A]ppellee contends that the order approving the claim was void since it was 'in direct violation of V.A.T.S. Probate Code, § 233,' pointing to the fact that the contingent fee contract mentioned in the claim referred to a fifty percent contingent fee while the code reference limits the contingent fee to one-third. We disagree for the reasons now to be stated.

"Even if we concede, which we do not, that the order approving the claim was erroneous, it was, nevertheless a judgment of a court of competent jurisdiction and is safe from a collateral attack. *Lynch v. Baxter*, 4 Tex. 431, 449 (1849). It being an order of the court made in the progress of a rightful administration, touching matters concerning which the court had the right to deliberate and decide, it may not be collaterally impeached because 'however erroneous [it] may be, [it is] not void.' *Withers v. Patterson*, 27 Tex. 491, 497 (1864)."

§ 242. Expenses Allowed

Personal representatives of estates shall also be entitled to all necessary and reasonable expenses incurred by them in the preservation, safe-keeping, and management of the estate, and in collecting or attempting to collect claims or debts, and in recovering or attempting to recover property to which the estate has a title or claim, and all reasonable

In Re Guardianship of Hair, 537 S.W.2d 82 (Tex.Civ.App.1976) at page 83 of 537 S.W.2d. The Supreme Court of Texas refused an application for writ of error, finding no reversible error.

The March 25, 1970 order of the Probate Court approving the contingent fee agreement had been in effect more than two years on December 7, 1973 when Attorney Casey first raised with plaintiff Norton any question as to the applicability of V.A.T.S. Probate Code § 233 to the fee agreement. An order of the Probate Court attempting to set aside the March 25, 1970 order came still later in time, and was itself set aside by that court, we are informed by counsel. In any event we view these later orders as of no effect on the controversy before us. At the time of all these events the March 25, 1970 order was "safe from collateral attack". *Hair, supra*.

On the basis of *Hair* we determine that summary judgment was improvidently entered, and reverse for further proceedings consistent herewith.

REVERSED.

attorney's fees, necessarily incurred in connection with the proceedings and management of such estate, on satisfactory proof to the court. Acts 1955, 54th Leg., p. 88, ch. 55.

Our reliance upon *In Re Guardianship of Hair*, Tex.Civ.App., 537 S.W.2d 82, relieves us of any duty to decide which, if either, statute was controlling.

**The United States Court Of Appeals
For The Fifth Circuit**

No. 75-3356

JOHN E. NORTON, ET AL.,

PLAINTIFFS-APPELLANTS.

Versus

THE AUSTIN NATIONAL BANK OF AUSTIN, TEXAS,
INDIVIDUALLY AND AS GUARDIAN OF THE ESTATE
OF ROBERT O. WALTERS, III,
DEFENDANT-APPELLEE.

Appeal from the United States District Court for the
Western District of Texas

**ON PETITION FOR REHEARING
(September 14, 1977)**

Before GEWIN, AINSWORTH and SIMPSON, Circuit
Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed
in the above entitled and numbered cause be and the
same is hereby DENIED.

ENTERED FOR THE COURT:

BRYAN SIMPSON
United States Circuit Judge

**United States Court of Appeals
For the Fifth Circuit**

No. 75-3356

D. C. Docket No. SA-74-CA148

JOHN E. NORTON, ET AL.,

PLAINTIFFS-APPELLANTS.

Versus

THE AUSTIN NATIONAL BANK OF AUSTIN, TEXAS,
INDIVIDUALLY AND AS GUARDIAN OF THE ESTATE
OF ROBERT O. WALTERS, III,
DEFENDANT-APPELLEE.

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF TEXAS**

Before GEWIN, AINSWORTH and SIMPSON, Circuit
Judges.

JUDGMENT

This cause came on to be heard on the transcript of
the record from the United States District Court for
the Western District of Texas, and was argued by
counsel;

ON CONSIDERATION WHEREOF, It is now here
ordered and adjudged by this Court that the judgment
of the said District Court in this cause be, and the
same is hereby, reversed;

It is further ordered that defendant-appellee pay to
plaintiffs-appellants, the costs on appeal to be taxed by
the Clerk of this Court.

In The United States District Court
For The Western District Of Texas
San Antonio Division

JOHN E. NORTON, ET AL.

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V8.

THE AUSTIN NATIONAL BANK OF § CIVIL ACTION
AUSTIN, TEXAS, INDIVIDUALLY § NO. SA-74-CA-148
AND AS GUARDIAN OF THE ESTATE §
OF ROBERT O. WALTERS, III, §
AN INCOMPETENT §

JUDGMENT

On April 30, 1975, this cause came on to be heard on motion of the Defendant for an order for summary judgment in favor of the Defendant against the Plaintiffs dismissing the complaint herein on the ground that there is no genuine issue in this case as to any material fact and that the Defendant is entitled to judgment against the Plaintiffs as a matter of law.

On considering the pleadings, the briefs and the affidavits before it, and after hearing the argument of counsel, due deliberation having been had, it appearing to the Court that the question whether the contingent fee contract sued upon by Plaintiffs calling for fifty percent (50%) attorney's fees to be paid by The Austin National Bank as Guardian of the Estate of Robert O. Walters, III, An Incompetent, is to be determined in accordance with Texas law, the law of the domicile and residence of the ward, as well as the law of the state in which the guardianship has at all pertinent times been pending and continues pending, and it appearing that the said contingent fee contract sued upon is not enforceable under Texas law and that were Defendant to pay more than one-third contingent fees, such would be unlawful and a violation of its fiduciary responsibilities to the ward, and it further appearing that there are no

facts alleged or that could be alleged that would give rise to any estoppel or that would make enforcement of the contingent fee contract in question lawful under Texas law, it thus appears that Defendant's motion should be granted and that Defendant is entitled to judgment dismissing Plaintiffs' complaint and denying Plaintiffs' complaint in its entirety.

It is therefore ORDERED that Defendant's motion for summary judgment be and the same hereby is granted.

It is further ORDERED, ADJUDGED AND DECREED that Plaintiffs take nothing against Defendant and that costs be and are hereby adjudged against Plaintiffs.

The Court is further of the opinion that the contingent fee contract in question, according to the affidavits before the Court submitted by Plaintiffs themselves, may be and is a contract of adhesion as to the incompetent ward and not enforceable for that additional reason, it appearing from said affidavits and from the form of contract used that the guardians and ward had no choice but to enter into the contract in question and that the provision in the contract calling for fifty percent (50%) attorney's fees was not negotiable. This finding that the contingent fee contract sued upon is a contract of adhesion and thus not enforceable is an independent basis for the granting of Defendant's motion for summary judgment and is merely an additional ground therefor. The Court further finds as a matter of fact and of law that whether or not the Probate Court of Bexar County ever "approved" the contingent fee contract in question is not controlling as to the enforceability of the contract at this time. It is undisputed as a matter of fact that the Probate Court of Bexar County retains jurisdiction of the estate of the ward, that the Probate Court withdrew or attempted to withdraw its earlier order "approving" the unlawful contract, and that the Probate Court has not and will not approve the payment of more than one-third contingent fees to Plaintiffs.

This judgment shall constitute the Court's conclusions.

MANUEL L. REAL, Judge Presiding

**United States District Court
Western District Of Texas
San Antonio Division**

JOHN E. NORTON, ET AL.

Vs.

SA-74-CA-148

THE AUSTIN NATIONAL BANK
OF AUSTIN, TEXAS, ETC.

JUDGMENT

This action came on for consideration before the Court, Honorable Manuel L. Real, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is, therefore, ORDERED AND ADJUDGED that defendant's motion for summary judgment is granted, plaintiffs take nothing against defendant, and costs are adjudged against plaintiffs.

DATED at San Antonio, Texas, this 14th day of July, 1977, nunc pro tunc May 23, 1975.

DAN W. BENEDICT, CLERK
UNITED STATES DISTRICT COURT

By CAROLYN R. WRIGHT
Deputy

**IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 75-3356

JOHN E. NORTON, ET AL.

APPELLANTS.

Vs.

THE AUSTIN NATIONAL BANK, INDIVIDUALLY,
AND AS GUARDIAN OF THE ESTATE OF
ROBERT O. WALTERS, III,
AN INCOMPETENT,

APPELLEE.

**APPELLEE'S MOTION FOR STAY OF MANDATE
PENDING APPLICATION TO SUPREME COURT FOR
WRIT OF CERTIORARI**

Appeal from the United States District Court
for the Western District of Texas
San Antonio Division

H. Lee Godfrey, Esq.
GRAVES, DOUGHERTY, HEARON,
MOODY & GARWOOD

2300 Austin National Bank Tower
Austin, Texas 78701

ATTORNEYS FOR APPELLEE

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3356

JOHN E. NORTON, ET AL.,
PLAINTIFFS-APPELLANTS

Vs.

THE AUSTIN NATIONAL BANK, INDIVIDUALLY
AND AS GUARDIAN OF THE ESTATE OF
ROBERT O. WALTERS, III,
AN INCOMPETENT,
DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Western District of Texas
San Antonio Division

CERTIFICATE REQUIRED BY
FIFTH CIRCUIT LOCAL RULE 13 (a)

The undersigned, counsel of record for THE AUSTIN NATIONAL BANK, certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that Judges of this Court may evaluate possible disqualifications or recusal pursuant to Local Rule 13(a).

| <u>Parties</u> | <u>Connection or Interest</u> |
|--|-------------------------------|
| John E. Norton Belleville, Illinois | Plaintiff |
| Kirk C. Waite Nashville, Tennessee | Plaintiff |
| Edward J. Kionka Belleville, Illinois | Plaintiff |

Austin National Bank
Austin, Texas

Defendant

Robert O. Walters, Jr.
San Antonio, Texas

Former guardian of estate and
guardian of person of the ward
whose estate is represented by
defendant bank.

Robert O. Walters, III,
an incompetent

San Antonio, Texas Ward whose estate is represented
by defendant bank.

H. LEE GODFREY
Attorney for Appellee

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3356

JOHN E. NORTON, ET AL.

APPELLANTS.

Vs.

THE AUSTIN NATIONAL BANK, INDIVIDUALLY
AND AS GUARDIAN OF THE ESTATE OF
ROBERT O. WALTERS, III,
AN INCOMPETENT.

APPELLEE.

APPELLEE'S MOTION FOR STAY OF MANDATE
PENDING APPLICATION TO SUPREME COURT FOR
WRIT OF CERTIORARI

**Appeal from the United States District Court
for the Western District of Texas
San Antonio Division**

TO THE HONORABLE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Appellee hereby respectfully moves that, pursuant to Rule 41, Federal Rules of Appellate Procedure, a thirty (30) day stay of the mandate in this case be granted pending application to the Supreme Court of the United States for a writ of certiorari. Appellee would show that this motion is timely filed under the said Rule 41 and that application for certiorari will be timely made to the Supreme Court of the United States.

WHEREFORE, PREMISES CONSIDERED, Appellee prays that this motion be granted and that the requested stay for thirty (30) days before issuance of the mandate in this cause be granted pending application for writ of certiorari.

Respectfully submitted,

**GRAVES, DOUGHERTY, HEARON,
MOODY & GARWOOD**
*2300 Austin National Bank Tower
Austin, Texas 78701*

By H. LEE GODFREY

ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Appellee's Motion for Stay of Mandate Pending Application to Supreme Court for Writ of Certiorari was mailed, certified mail, return receipt requested to the opposing counsel, Robert B. Summers, Esq., Clark, Thornton & Summers, 1910 Tower Life Bldg., San Antonio, Texas 78205 and Edward J. Kionka, Esq., 211 West Main Street, Belleville, Illinois 62220, on this the 30th day of September, 1977.

H. LEE GODFREY

APPENDIX F

§233. Collection of Claims and Recovery of Property

Every personal representative of an estate shall use ordinary diligence to collect all claims and debts due the estate and to recover possession of all property of the estate to which its owners have claim or title, provided there is a reasonable prospect of collecting such claims or of recovering such property. If he willfully neglects to use such diligence, he and the sureties on his bond shall be liable, at the suit of any person interested in the estate, for the use of the estate, for the amount of such claims or the value of such property as has been lost by such neglect. Such representatives may enter into contract to convey, or may convey, a contingent interest in any property sought to be recovered, not exceeding one-third thereof, for services of attorneys and incidental expenses, subject only to approval of the court in which the estate is being administered. Acts 1955, 54th Leg., p. 88, ch. 55.

§242. Expenses Allowed

Personal representatives of estates shall also be entitled to all necessary and reasonable expenses incurred by them in the preservation, safe-keeping, and management of the estate, and in collecting or attempting to collect claims or debts, and in recovering or attempting to recover property to which the estate has a title or claim, and all reasonable attorney's fees, necessarily incurred in connection with the proceedings and management of such estate, on satisfactory proof to the court. Acts 1955, 54th Leg., p. 88, ch. 55.